Supreme Court, U. S.
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No. 79-1031

In the Supreme Court of the United States

OCTOBER TERM, 1979

SOUTHWEST TEXAS METHODIST HOSPITAL,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 606 F. 2d 63. The order of the district court (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1979. A timely petition for rehearing was denied on October 1, 1979 (Pet. App. A). The petition for a writ of certiorari was filed on Monday, December 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that summary judgment should not be entered in this case because material facts remain in genuine dispute.

STATEMENT

On March 27, 1978, the Equal Employment Opportunity Commission filed this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint alleges that Southwest Texas Methodist Hospital has unlawfully maintained sex-based job classifications by hiring only women as dietary aides and only men as dietary porters. The complaint further alleges that the hospital unlawfully refused to hire Ms. Ann Tarpley as a dietary porter because of her sex.

After this action was filed, Ms. Tarpley entered into a settlement of her individual claim with the hospital (Pet. App. B 15). Further negotiations between the hospital and the Commission, however, failed to resolve the outstanding claim that the hospital maintained unlawful sex-segregated job classifications. Before discovery on this claim was completed, the hospital filed a motion to dismiss or for summary judgment. The district court thereafter stayed further discovery pending disposition of the motion.

In support of its motion for summary judgment, the hospital filed an affidavit stating that the hospital's official policy is to provide equal employment opportunities for all individuals without regard to sex. The hospital also filed copies of written job descriptions for the positions in question and an affidavit stating that women comprised approximately 75% of the hospital's total workforce (Pet. App. B 15).

The Commission responded to the motion with an affidavit by an EEOC attorney that summarized certain records obtained from the hospital. These records were

attached as exhibits to the affidavit.[1] The exhibits, which were not challenged in the courts below, revealed (1) that, at the time Ms. Tarpley applied for a position as a dietary porter, there were three vacancies; (2) that each of these vacancies was eventually filled by a man; and (3) that between September 1, 1975, and December 31, 1975, the hospital hired nine "Dietary Porters", all of whom were men, and eight "Dietary Aides", all of whom were women. The records also showed that, as late as June 30, 1978, all persons employed in the "Dietary Porter" classification were men. The Commission also submitted an affidavit from Ms. Tarpley stating that, when she applied for a job, she had been advised by a hospital employee in the personnel department that the "Dietary Porter" position was for males only (Pet. App. B 15).

The district court issued an order granting the hospital's "Motion To Dismiss and/or For Summary Judgment" (Pet. App. C). The court gave no explanation for its order.

The court of appeals, after summarizing the evidence in the record, reversed the award of summary judgment. The court held that the record revealed that there are genuine issues of material fact as to whether the hospital maintained sex-segregated job classifications and that "[a] full hearing on the merits is, therefore, necessary * * *" (Pet. App. B 15).

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[1]The affidavit identifies the exhibits as the hospital's records. The hospital, in its brief in the court of appeals, conceded that these records had been provided by the hospital to the Commission during settlement negotiations after suit was brought (Appellee's Br. 22 n.5; see also *id.* at 21).

ARGUMENT

The decision of the court of appeals properly applies established principles of law to the facts of this case. Further review is therefore unwarranted.

1. It is, of course, well settled that a motion for summary judgment must be denied if material issues of fact remain in genuine dispute. *E.g.*, *Poller* v. *Columbia Broadcasting, Inc.*, 368 U.S. 464, 467 (1962); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944). The question whether the court of appeals correctly determined that material issues of fact remain in genuine dispute in this case is not of sufficient importance to merit further review.

2. In any event, the court of appeals correctly concluded that material facts remain in dispute. The affidavits submitted by the hospital in the district court purport to establish only that the hospital has a policy of neutrality and that it in fact hires more women than men. But these assertions do little to rebut the allegation of the complaint, which is that the hospital hires only men as dietary porters and only women as dietary aides.

The Commission's affidavits, moreover, indicate that the hospital has pursued a sex-segregated course of hiring for several years, hiring only men as dietary porters and only women as dietary aides. The affidavit of Ms. Tarpley buttresses this statistical evidence, for she states that a hospital official informed her that the dietary porter position was reserved for men only (Pet. App. B 15). The information in these affidavits is sufficient to establish a genuine dispute as to whether the hospital has engaged in sex discrimination in violation of Title VII. Petitioner thus has not carried its burden of showing that there are no material facts remaining in dispute. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 159-160 (1970).

Petitioner contends that the affidavits and exhibits filed by the EEOC in opposition to the motion for summary judgment should not have been considered by the court of appeals because one of the affidavits was not based on personal knowledge and the exhibits were not sworn to or identified as required by Fed. R. Civ. P. 56. Because this contention was not raised in either court below, it is not properly presented for review by this Court. *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, *supra*, 398 U.S. at 147 n.2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). Moreover, petitioner's failure to question the technical compliance of these documents with Rule 56 during the proceedings before the district court constitutes a waiver of that objection.[2] In any event, the hospital conceded in the court of appeals that the exhibits attached to the EEOC affidavit were part of the materials provided to the Commission by the hospital during settlement negotiations. See pages 2-3, *supra*. These authenticated exhibits, plus the affidavit of Ms. Tarpley based on her personal knowledge, are sufficient to establish that a genuine dispute of material facts continues to exist in this case.

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[2]Absent a timely objection under Rule 56(e) in the district court, formal defects in materials submitted on a summary judgment motion are waived, and the unchallenged materials may be considered by the court. See, *e.g.*, *Lacey* v. *Lumber Mutual Fire Insurance Co.*, 554 F. 2d 1204, 1205 (1st Cir. 1977); *Noblett* v. *General Electric Credit Corp.*, 400 F. 2d 442, 445 (10th Cir.), cert. denied, 393 U.S. 935 (1968); *Auto Drive-Away Co.* v. *Interstate Commerce Commission*, 360 F. 2d 446, 448-449 (5th Cir. 1966); *Chambers* v. *United States*, 357 F. 2d 224, 228 & n.3 (8th Cir. 1966); *United States for the Use and Benefit of Austin* v. *Western Electric Co.*, 337 F. 2d 568, 575 (9th Cir. 1964); *Klingman* v. *National Indemnity Co.*, 317 F. 2d 850, 854 (7th Cir. 1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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